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No. 87-1084

In the Supreme Court of the United States

OCTOBER TERM, 1987

ALFRED E. RAMEY, PETITIONER

v.

GENERAL ACCOUNTING OFFICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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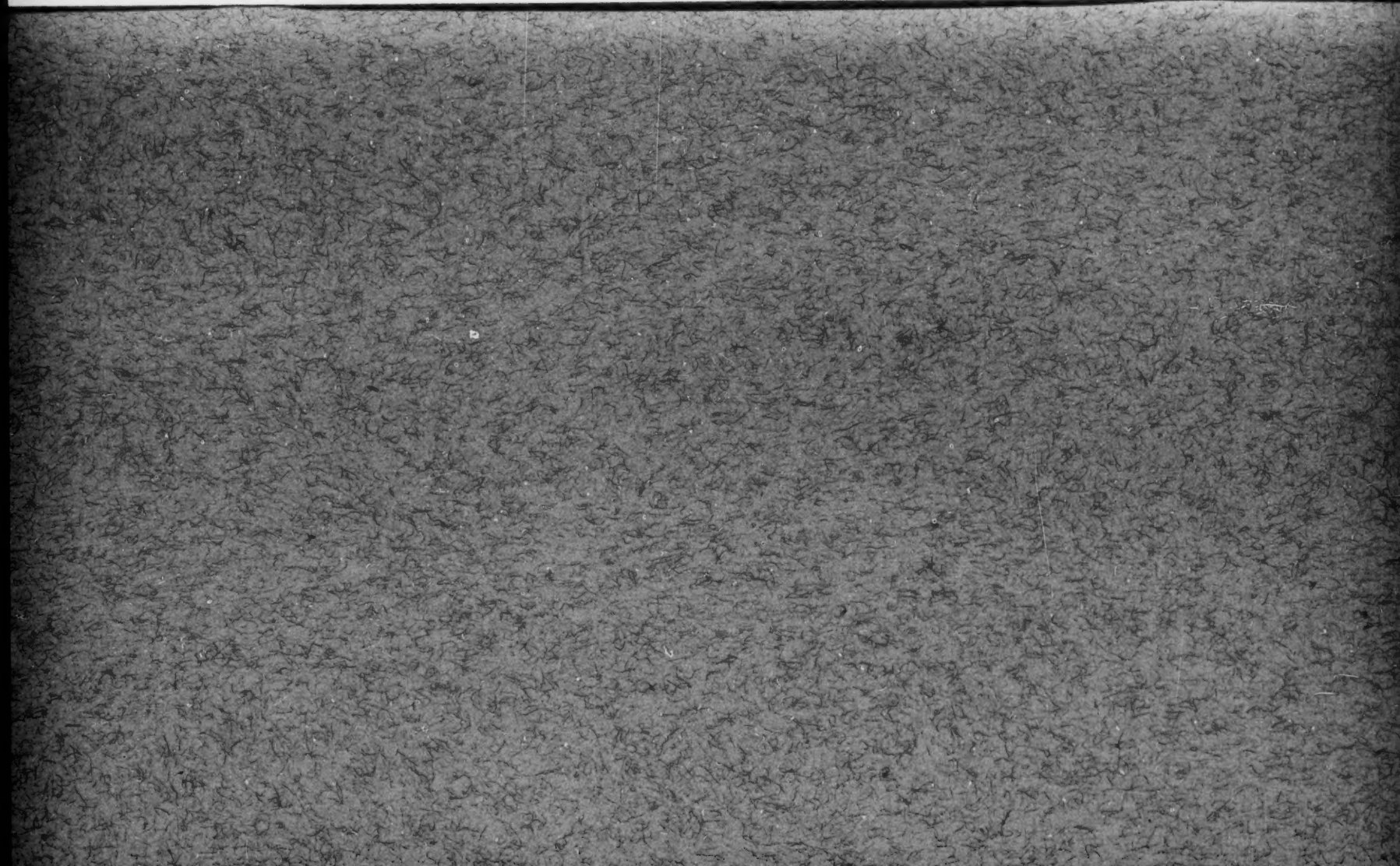


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Petitioner contends that the court of appeals erroneously denied him attorney's fees in connection with an appeal in which he intervened but which the government voluntarily dismissed prior to any briefing by the parties.

1. Beginning in early 1983, the General Accounting Office (GAO, or respondent) notified petitioner, a GS-13 computer specialist, that his work performance had become unacceptable (Pet. App. 1d-2d). After affording petitioner several opportunities to improve his performance and detecting no such improvement, respondent terminated petitioner's employment (*id.* at 3d-7d).

Petitioner thereafter filed a complaint under the General Accounting Office Personnel Act of 1980, 31 U.S.C. (& Supp. III) 731 *et seq.* (the Act), charging that the removal decision was in retaliation for an earlier discrimination charge that he had filed (Pet. App. 8d). After more than 20 days of hearings, a Hearing Officer for the GAO Personnel Appeals Board (the Board, or PAB) found that respondent's decision to terminate petitioner

was supported by substantial evidence and that there was no evidence of retaliatory motive (*id.* at 14d-15d). On appeal, however, the Board reversed, holding that petitioner's termination had been ordered "in reprisal for his protected * * * activities" (*id.* at 43d). The Board directed that petitioner be reinstated immediately and be granted back pay (*id.* at 44a).

2. Respondent thereafter filed a protective petition for review in the court of appeals, naming the Board as the opposing party, and petitioner moved to intervene. On December 5, 1986, however, the Solicitor General denied respondent authorization to proceed with the appeal. Before briefing or argument was even set in the case, respondent accordingly moved for voluntary dismissal, with no costs to any party (Pet. 14-15). Petitioner opposed the motion "until the [c]ourt of [a]ppeals awarded him attorneys' fees and costs for services rendered in intervening and defending against the [GAO's] appeal" (*id.* at 15-16).

In an unpublished, per curiam order, the court of appeals granted petitioner leave to intervene but, at the same time, granted respondent's motion for voluntary dismissal and denied petitioner's request for attorney's fees (Pet. App. 1a-5a). The court concluded (*id.* at 3a) that petitioner had "not demonstrated an adequate basis for an award of fees or costs" and that "[n]either the statutory basis relied on by [petitioner] nor the court's authority pursuant to Rules 38 and 39 of the Federal Rules of Appellate Procedure justifies an award of costs or fees in this case." In particular, the court held (Pet. App. 3a-4a) that the General Accounting Office Personnel Act of 1980, 31 U.S.C. (& Supp. III) 731 *et seq.*, "does not incorporate the attorney's fee provisions of Title VII [of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*,] *en bloc*." Rather, the court explained (Pet. App. 4a), the Act requires the PAB to prescribe regulations consistent with 5 U.S.C. (& Supp. IV) 7701 and 7702—provisions which, in turn,

adopt the attorney's fees standard under Title VII but only in cases in which there has been a finding of discrimination under 5 U.S.C. 2302(b)(1) of the Civil Service Reform Act of 1978.[1] The court could discern no such finding in this case (Pet. App. 4a). In any event, the court noted (*id.* at 4a-5a), even if there were a finding of discrimination, that would entitle petitioner to fees only in connection with administrative, and not judicial proceedings.[2]

Petitioner thereafter requested rehearing, with a suggestion for rehearing en banc. In a second unpublished order, the court denied the petition (Pet. App. 1b-4b). It reiterated (*id.* at 2b) that the General Accounting Office Personnel Act does not incorporate the attorney's fee provisions of Title VII en bloc, and it rejected the more specific contention (*id.* at 2b-3b) that Section 732(f)(2) of the Act, 31 U.S.C. 732(f)(2), effects such an incorporation. On September 29, 1987, the court denied rehearing en banc (Pet. App. 1c-2c).

3. Petitioner contends (Pet. 19-31) that under 31 U.S.C. 753(d) he is entitled to attorney's fees for his efforts in the court of appeals in defense of the Board judgment in his favor. He reasons that Section 753(d) incorporates the fee provisions of 5 U.S.C. 7701(g), and that the latter provision, in turn, incorporates the fee standards of Section 706(k) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(k). As the court of appeals correctly observed (Pet. App. 4a-5a), however, Section 7701(g) empowers only "the Board, or an administrative law judge or other employee of the Board" to require the payment of

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[1] The court erroneously referred (Pet. App. 4a) in its decision to 5 U.S.C. 2301(b)(1), instead of 5 U.S.C. 2302(b)(1), but it corrected that error in its subsequent order in the case (see Pet. App. 4b).

[2] In support of that proposition, the court cited *Olsen* v. *Department of Commerce, Census Bureau*, 735 F.2d 558, 560 (Fed. Cir. 1984).

attorney's fees. There is nothing in Section 7701 that authorizes the payment of fees for work done in a federal court of appeals. And because the government is immune from such fee awards in the absence of an explicit statutory waiver, see, *e.g.*, *United States* v. *Testan*, 424 U . S. 392, 399 (1976); *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 265-268 (1975), petitioner may not rely on 5 U.S.C. 7701, as incorporated by 31 U.S.C. 753(d), as a basis for attorney's fees.

4. The decision of the Federal Circuit in *Olsen* v. *Department of Commerce, Census Bureau*, 735 F.2d 558 (1984), is not to the contrary. In that case, the court of appeals held that attorney's fees are available under the Equal Access to Justice Act (EAJA), 28 U.S.C. (& Supp. III) 2412, in connection with proceedings in the court of appeals to review decisions of the Merit Systems Protection Board. The present case is not in conflict with that holding, however, since petitioner has not relied on EAJA as the basis for a fee award. To the contrary, he has relied solely on 5 U.S.C. 7701, as incorporated by 31 U.S.C. 753(d). And the court of appeals correctly cited (Pet. App. 5a) the *Olsen* case as support for the proposition that Section 7701 applies only to work performed before the agency. See *Olsen*, 735 F.2d at 560.

5. Finally, petitioner is mistaken in contending (Pet. 37-48) that 31 U.S.C. 732(f)(2) incorporates the fee provisions of Title VII of the Civil Rights Act. By its terms, that provision simply states that the subchapter does "not affect a right or remedy of an officer, employee, or applicant for employment under a law prohibiting discrimination in employment in the Government on the basis of race, color, religion, age, sex, national origin, political affiliation, marital status, or handicapping condition." In so stating, Section 732(f)(2) does nothing more than *preserve*

rights that are available under other statutes; it does not, in petitioner's words, "incorporate[] Title VII rights and remedies *en bloc*" (Pet. 46-47). Indeed, as the court of appeals correctly observed (Pet. App. 3b-4b), other parts of the General Accounting Office Personnel Act effect a "piecemeal incorporation[]" of Title VII, which would be entirely "superfluous, were Section 732(f)(2) a total incorporation of Title VII." Congress' decision expressly to incorporate some, but not all of the provisions of Title VII, must be regarded as compelling evidence that a wholesale incorporation was not intended. See *Aaron* v. *SEC*, 446 U.S. 680 (1980); *Andrus* v. *Glover Constr. Co.*, 446 U.S. 608, 616-617 (1980); *TVA* v. *Hill*, 437 U.S. 153, 188 (1978).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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